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Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515-6015

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August 23, 2019

The Honorable Kevin McAleenan
Acting Secretary
Department of Homeland Security
Washington, D.C. 20528

Dear Mr. Secretary:

This letter responds to the July 26, 2019, notification submitted to the Committee by Ms. Stacy Marcott, Acting Chief Financial Officer (CFO) of the Department of Homeland Security (DHS) to transfer and reprogram funds to U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations, for the cost of expanding detention bed capacity beyond the level supported by appropriations for fiscal year 2019 and for the cost of immigration court space related to the operation of the Migrant Protection Protocols (MPP).

I have significant concerns about the intended use of funds and, consequently, about the tradeoffs between that use and the activities that would otherwise be funded from the source accounts, ranging from the procurement of Coast Guard assets to the improvement of the National Cybersecurity Protection System.

The notification materials cite the Department's authority under section 503(d) of Public Law 116-6, which permits reprogramming and the use of transfer authority based on notifications submitted after June 30, 2019, only "in extraordinary circumstances that imminently threaten the safety of human life or the protection of property." The notification documentation lacks any analysis to demonstrate that the movement of funds is justified under one or both criteria. Although not cited in the notification letter, section 208 authorizes reprogramming and the use of transfer authority after June 30, 2019, "as necessary to ensure the detention of aliens prioritized for removal." Use of that authority would similarly require an explicit justification for its use.

It is unfortunate that the Department has again elected to ignore the negotiated agreement with Congress by vastly exceeding the amount appropriated for immigration enforcement and removal operations in the Department of Homeland Security Appropriations Act, 2019 (Public Law 116–6), despite the record high funding level it provided for ICE. Although the increase in single adult migrants crossing the southern border earlier this year may justify some additional requirement for detention bed capacity, ICE began to exceed its funded level for detention beds well before the apprehensions of single adults at the border began to exceed historic levels, including during the period when the Department was operating under a continuing resolution (CR).

Under a CR, operations should continue at the level funded in the prior year appropriation. For the current year, that means ICE should have maintained an average daily population of 40,520 during the CR period; yet, ICE use of detention beds in the first quarter of the fiscal year surged from 44,000 to over 46,000, before the historically significant migrant surge at the border.

To better understand how ICE budgets for its operations, the Explanatory Statement that accompanied Public Law 116–6 directed ICE to brief the Committee on a detailed plan for operating within its budget not later than 60 days after enactment, with follow-on briefings to be provided monthly thereafter. The Committee has not yet received even the initial briefing, which was due April 16, 2019.

Instead, ICE continued to expand its detention bed capacity, reaching a daily population of single adults in detention of nearly 55,000 in August, despite a significant reduction in single adults crossing the border since early June and at the same time that ICE engaged in a large-scale worksite enforcement action that required the detention of hundreds of individuals.

It is notable that the single adult population in detention associated with interior enforcement decreased from a high of approximately 23,500 in mid-2018 to 18,440 as of August 10, 2019, demonstrating ICE’s ability to adjust its level of interior enforcement activity. It is unclear, however, whether ICE fully used its discretion to realign resources from the interior to the border in response to the surge in single adult migration because ICE is unable to document how it prioritizes the use of funds. It is also unclear whether ICE is efficiently managing the length of stay of asylum seekers by releasing those who have received a positive fear determination if they do not pose a flight risk or a risk to the community.

The Department’s transfer authority, derived exclusively from section 503 of its annual funding bill, is provided by Congress to allow the Department to respond to unforeseen events and circumstances, not to routinely augment an appropriation. In addition, the late submission of this notification undermines and ignores the time-tested mechanism for ensuring that the House and Senate Committees on Appropriations are in concurrence with proposed transfer and reprogramming actions. In short, the Department has already incurred most of the obligations related to the notification and therefore any non-concurrence with the proposed action is essentially moot.

The mechanism for seeking Committee concurrence has been maintained by the Department and the Committees since the Department's inception and has been critical to the annual renewal of the Department's transfer authority. The Department has now placed the renewal of that authority in jeopardy.

Given that the Department will execute the noticed transfers at the completion of the required 30 day notification period, and based on the premise that additional funding has been required by the border surge, I expect ICE to refrain from increasing the population in detention resulting from interior enforcement actions for the remainder of fiscal year 2019 and during the period of any continuing resolution for fiscal year 2020. I also expect ICE to release on parole or alternatives to detention individuals with a positive fear determination who do not pose a threat to public safety and are not considered a flight risk.

The July 26, 2019, notification also signaled the Department's intent to transfer \$155,000,000 in unobligated recoveries from the base Disaster Relief Fund account to ICE Operations and Support for the establishment of immigration court hearing facilities for the Executive Office of Immigration Review (EOIR). I object to the use of funds for that purpose because the Department has provided no substantiation for a claim that this transfer is necessary due to "extraordinary circumstances that imminently threaten the safety of human life or the protection of property."

No information has been provided to suggest there is an imminent threat that these hearing facilities would address. To the contrary, it has been the Trump administration's implementation of the MPP that has placed the safety of migrants at risk by returning them to Mexico without adequate planning or other steps to ensure their safety. Further, such hearing facilities provide no immediate benefit to migrant safety. The stated need for immigration hearing space near land ports of entry is a direct result of this Administration's policy choices, not due to any imminent threat to the safety of human life or the protection of property independent of those choices.

I also object to the proposed use of funds for the MPP program because it appears to violate section 1301(a) of title 31, United States Code, otherwise known as the purpose statute, which prohibits the obligation of funds from one appropriation account for a purpose if Congress has appropriated funds for that purpose through another account. In this case, the funding for EOIR hearing facilities is appropriated by Congress through the Department of Justice (DOJ).

The Explanatory Statement accompanying the fiscal year 2019 Appropriations Act specified the use of DOJ/EOIR funding for immigration judge teams, "including associated space and technology requirements." Even more specifically, the fiscal year 2019 border supplemental (Public Law 116-26) appropriated \$10,000,000 specifically to EOIR for "the purchase or lease of immigration judge courtroom space and equipment." I am aware that space has historically been made available in some ICE detention facilities for EOIR hearings, but that is a far different circumstance than the obligation of funds by ICE for separate and *de novo* immigration court hearing facilities.

It is of great concern that during the course of this administration, there has been a growing disconnect between the will of Congress, as represented by ICE funding levels in enacted appropriations bills signed by the President, and the Department's immigration enforcement operations, which often lack justification. I urge you to with work the Committee to restore the partnership we once had in support of the Department's many important missions.

Sincerely,



LUCILLE ROYBAL-ALLARD

Chairwoman

Subcommittee on Homeland Security

cc: Representative Charles J. "Chuck" Fleischmann